IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1336 OF 2003
IN
SUIT NO.4913 OF 2000

WITH

CHAMBER SUMMONS NO.1488 OF 2003
IN
SUIT NO.4913 OF 2000

Majid Ahmedbhai Oomerbhoy .. Plaintiff

Vs.

Rashid Sattar Oomerbhoy
& Ors. .. Defendants

And

The Court Receiver, High
Court, Bombay & Another .. Respondents

Mr.Anil Kumar with Prakash Shinde i/b M.M.Dhruva & Co. for the plaintiffs in Chs 109/01 & Chs 429/04

Mr.Shyam Diwan with Prakash Shinde for plaintiffs in support of Chs 1793/03 & Chs 1336/03

Mr.Jai Chinai with Sanjay Jain i/b Mr.Ranchoddas for Defendant no.1 in support of Chs. 1488/03

Mr.R.V.Pai i/b A.N.Makhijani in support of Chs. 429/04 in support

Mr.R.V.Pai i/b Ms.Neeta P.Karnik in support of Chs 1109/01

Mr Sanjay Jain with Kalpesh Joshi i/b Malvi Ranchoddas & Co. D.No.1 in all the Chs.

Mr.Mukul Taly i/b S.Mohd.Bhai & Co. D.Nos.2 to 4

in all Chs.

Mr.A.K.Pradhan C.A. for Ct.Receiver present

Mr.M.V.Deshmukh Ct.Receiver present in Court.

CORAM : S.U.KAMDAR, J

DATED : 23RD MARCH, 2005

ORAL JUDGEMENT :

1. Both these Chamber Summons are challenging the order passed by the Court Receiver, High Court, Mumbai on 25th June 2003. Both the challenges are exactly identically opposite to each other. The Chamber Summons taken out by the plaintiff being Chamber Summons 1336 of 2003 seeks enhancement of the Royalty amount fixed by the Court Receiver under the impugned order whereas the Chamber Summons dated 1488 of 2003 initiated by the defendant no.1 who is in possession of one of the properties seeks to reduce the royalty amount fixed by the Court Receiver, High Court, Mumbai, In view of the fact that both these Chamber Summons are challenging the same order passed by the Court Receiver, I propose to dispose of both of them together. Some of the material facts for the determination of the present Chamber Summons

without going into the unnecessary details are as under:

2. There are disputes and differences between the plaintiff and defendants pertaining to the family properties, the family business and also the partnership disputes in respect of firm known as Ahmed Oomerbhoy Pvt.Ltd. In a long list of proceedings one of the suits filed is Suit No.4913 of 2000. The said suit is in respect of partnership firm of Ahmed Oomerbhai. The said partnership was a registered partnership and on 08.10.1991 the defendant no.2 and 3 have served the notice of dissolution and consequently filed a suit of dissolution being Suit No.3425 of 1991 which is pending in this Court. The Receiver was appointed in respect of properties of the said partnership firm. The defendant no.1 thereafter filed another suit being suit no.722 of 1992 which is also pending in this court. The said suit interalia claims that there is a family arrangement and declaration that the family arrangement subsists and in alternative thereto the said firm should be dissolved. The present suit being 4913 of 2000 is the third suit filed by the plaintiff herein once

again contending that the partnership firm was constituted under the deed of partnership which was dissolved at will. He has issued the notice of dissolution and had prayed for the appointment of Court Receiver, High Court, Mumbai.

3. In the present suit, the notice of motion was taken out being 3419 of 2000. The said Notice of Motion along with another proceeding being Chamber Summons 555 of 2001 came up for hearing before the learned single Judge on 31.7.2001. By an order on the said Notice of Motion the Court Receiver, High Court, was appointed as Receiver in respect of various properties which inter alia included the following two properties:

1. Flat No.5, 2nd Floor, Soona Mahal, Marine Drive, Veer Nariman Road, Mumbai.

2. Flat No.2A, 2nd Floor, Andromeda Co-operative Housing Society Ltd., Worli, Mumbai

4. Though there are various properties and

assets of which the Court Receiver, High Court, Mumbai has been appointed as Receiver under the said order however, since I am concerned in the present Chamber Summons only in respect of 2 of the properties I am dealing with the contention pertaining thereto only.

5. A further order dated 2.8.01 was passed. In the said order it has been interalia recorded that in so far as Soona Mahal is concerned there is no dispute that the said property is a property owned by the partnership firm and the Court Receiver, High Court, Mumbai can be appointed as a Receiver thereto. It has further recorded that the defendant no.1 is in possession and the firm floated by the son of defendant no.1 is fully controlled by defendant no.1 and his son and the firm is not claiming any independent rights in the said property. It was therefore, held that they can be appointed as an agent of the Court Receiver.

6. Under the aforesaid orders though the Court Receiver, High Court, Mumbai has been appointed as a Receiver in respect of aforesaid premises. The

defendant no.1 as well as the respondent no.2 who were in possession of the said premises have been continued to be in possession without payment of any security award. However, on payment of royalty charges to be fixed by the Court Receiver, High Court, Mumbai. Pursuant thereto, the Court Receiver, High Court, Mumbai called for valuation report and valuation report has been furnished on 11.12.01 by one M/s.S.S.Joshi & Associates, The Receiver thereafter passed an order on 28.1.02 fixing the royalty @ Rs.1,10,000/- in respect of flat at Soona Mahal, Nariman Point, Mumbai. The said order of the Receiver was set aside by the learned single Judge of this Court on 8.2.02 and the matter was remanded back for passing a fresh order by giving a reasoned and speaking order on 21.6.02. The Court Receiver, High Court, Mumbai has passed a consequently afresh order which also has been set aside by an order passed by the learned single Judge on 16.6.03. Once again the learned single Judge remanded the matter back to the Court Receiver for its fresh determination of the royalty charges. After the hearing and passing of the order on two rounds of litigation the Court

Receiver has now passed the impugned order dated 25.6.03 fixing the Royalty amount in respect of aforesaid 2 properties. By the said order, the Court Receiver has re-fixed the Royalty amount in so far as Flat at Soona Mahal is concerned at Rs.1,10,000/- per month and in so far as flat situated as Worli is concerned at Rs.53,000/- per month. While fixing the aforesaid royalty amount, the Court Receiver, High Court, mumbai has taken into consideration the report filed by the Valuer, M/s.S.S.Joshi and has fixed the amount accordingly. The Court Receiver, High Court has given a reasoning whilst fixing the aforesaid royalty amount under the impugned order.

7. While fixing the amount the Court Receiver has taken into consideration the prevailing market rate in respect of the said properties. The court receiver has rejected the contention of the defendant no.1 herein that the amount of royalty should be fixed in accordance with the standard rent payable by a person in occupation. The aforesaid contention has been raised by the defendant no.1 on the basis of the Judgement of

this court in the case of Pradeep C.Mody Vs. Sashikant C.Mody & Ors. and Court Receiver, High Court, Bombay reported in 1998(3) Bombay CR 823 and has fixed the amount on the basis of market value of the property. The Court Receiver has given a detailed reasoning in support of his fixation of the royalty charges by the Court Receiver.

8. This order of the Court Receiver is challenged by the plaintiff by interalia contending that the Court Receiver has totally erred in fixing the valuation of the flat at Rs.1,10,000/- because he has valued the flat as residential premises by taking into consideration the residential rate prevailing thereon even though admittedly the said flat has been used by defendant no.1 for office purpose i.e. as commercial premises and therefore the rate prescribed in stamp duty Ready Reckoner which has been taken into consideration by the Court Receiver should be on the basis of Commercial Premises and not on the basis of residential premises.

9. The 2nd contention raised by the learned

counsel for the plaintiff is that the Court Receiver has taken into consideration the area of the Marine Drive into account for valuation of the said property whereas the property is situated at the junction of Marine Drive and Veer Nariman Road. Thus, the Court Receiver should have fixed the royalty amount by taking into account the rate of valuation prescribed for an area mentioned as Veer Nariman Road and not Marine Drive. Additional contention raised by the plaintiff is that the fixation of the return at 9% of the market value of the property is too low and the court receiver should have fixed higher rate of return for arriving at fixation of royalty charges payable in respect of the said flat.

10. On the other hand the learned counsel for the defendant has contended firstly that the amount fixed by the Court Receiver as royalty amount based on the Market Value of the land is erroneous and in fact the said flat ought to have been valued on the basis of tenanted premises since admittedly the company who is in use occupation and possession of the said premises as a tenant of defendant no.1 and

therefore in any event the right of occupation can be determined only on the basis of principle of standard rent and not on the basis of market value of the said property. It has been further contended by the learned counsel for the defendant that assuming the market value is proper criteria still the court receiver should not have fixed the amount as contended by the plaintiff because the plaintiff is trying to fix the amount at much higher rate which is not even supported by the ready reckoner of the stamp duty published by the State Government. Thirdly, it has been contended that the 9% return fixed by the Court Receiver is very high in respect of the long term investment in immovable properties and therefore the return has to be calculated from 4 to 5% only. In so far as the flat at Worli is concerned the plaintiff has challenged the royalty amount only on a short point. In so far as market value is concerned they are not disputing the same. However it is contended by the plaintiff that while arriving at the calculation of the royalty amount the court receiver has calculated wrong area of the flat and therefore the wrong market value has been arrived

at and consequently erroneous royalty amount has been fixed by the Court Receiver.

11. According to the plaintiff the area of the flat is 1750 sq.ft. in terms of the agreement which has been executed while purchasing the flat. Whereas the Court Receiver has taken into consideration the area of the Worli Flat at only 992 sq.ft. which is lesser area and therefore there is an apparent error in arriving at the royalty amount fixed by the Court Receiver in so far as the said flat is concerned. It has been therefore contended that the court receiver should recompute the said royalty amount in so far as the Worli flat is concerned by taking into consideration the correct area of the flat. On the other hand the learned counsel for the respondent no.2 has contended that the area mentioned by the Court Receiver is correct area and the area mentioned in the agreement ought not to be taken into consideration while fixing the amount. The respondent no.2 has not initiated any proceeding challenging the market value of the flat fixed by the Court Receiver for the purpose of determination

of the royalty amount and he has accepted the same.

12. In the light of the rival submissions I am required to decide firstly whether the fixation of royalty amount by the Court Receiver is based on correct and erroneous principle of law pertaining to market value of the flat. Secondly, I am required to decide whether the Court Receiver was justified in taking into consideration the percentage as 9% as reasonable return for purpose of determination of royalty amount. Thirdly, I am required to decide whether the area which has been taken into consideration for the purpose of Soona Mahal flat and market value to be fixed on the basis of commercial user of occupation thereof. and fourthly, and lastly I have to determine what should be the actual area of the flat at Worli whether the Court Receiver has taken into consideration the correct area of the flat into consideration or not for determination of royalty charges.

13. The learned counsel for the respondent opposing the Chamber Summons No.1336 of 2003 as

well as supporting his Chamber Summons No.1448 of 2003 has interalia relied upon the Judgment of the learned single Judge of this court in the case of Pradeep C. Mody Vs.Sashikant C.Mody reported in 1998(3)Bom.C.R.823 and has contended that the only basis on which the premises occupies by tenant can be evaluated for the purpose of fixation of royalty is the standard rent which was liable to be paid in respect of the said premises. According to the learned counsel the occupation of a person cannot be evaluated on the basis of market value of the said property but occupation of a person should be evaluated on the basis of provision of rent act and the standard rent is the only method for the purpose of fixation of rent and/or royalty amount. The learned counsel for the plaintiff has drawn my attention to the Judgment of the Division Bench of this court in Appeal no.77 of 2003 in Chamber Summons 1348 of 2002 in the case of Mrs.Vidya Prem Rathore Vs. Ms.Sushma Kishore Mehta and ors a Division Bench of A.P.Shah & Smt.Ranjana P.Desai, JJ. dated 24.2.2003 in which the Division Bench has clearly distinguished the Judgment of the Single Judge on the ground that the case before the

learned single Judge in that matter was in respect of tenancy rights of the said premises and that the Court Receiver was appointed of the tenancy rights of the premises and thus the same is not applicable in the other cases where receiver is appointed of ownership premises. The relevant portion of the Judgment of the Division Bench reads as under:

> "Mr.Narulla, appearing for the appellant submitted that the royalty ought to be fixed on the basis of the tenancy agreement. He relied upon the decision of the Supreme court in Pradeep C Mody vs. Shashikant c Mody and ors AIR 1998 Bom 351. That case is clearly distinguishable on facts. In that case the Court Receiver was appointed receiver for tenancy rights in respect of the premises. In the present case the tenancy claim set up by the appellant is challenged by the respondents. In Pradeep C Mody s case b consent of the parties Receiver was appointed in respect of the admitted tenancy rights of the deceased and it was observed that there was no basis for the Receiver to charge more than the standard rent for the e Court Receiver as the Court Receiver is not entitled to profit from the property as it would violate the provisions of the Bombay Rent Act. In the present case the agreement of tenancy is seriously disputed. Parties have consented for appointment of the Court Receiver as Receiver in respect of the suit premises. Parties also agreed that the Receiver shall fix the royalty on usual terms and conditions. Under these circumstances the learned single Judge was right in fixing the royalty at the rate of Rs.20,000 per month."

14. In the case before me there is no question of challenge or determination of tenancy and admittedly the flat at Soona Mahal is an asset of the partnership firm and firm has ownership rights therein. The defendant no.1 is a partner of the said firm and is in use occupation and possession of the said flat in his capacity as partner. The firm R.R.Oomerbhoy which belongs to the son of the defendant no.1 has already declared that they do not claim any right title and interest in respect of the said flat. In view thereto the question of applying principle of computation of royalty on the basis of standard rent and/or on the basis of tenancy rights in the premises in the present case does not arise. In my view in the view of the Judgement of the Division Bench of this court, the approach of the court receiver to fix the Royalty on the basis of the market value of the property is correct and appropriate.

15. Another argument which has been advanced before me is whether the premises Soona Mahal situated at Corner of Veer Nariman Road and Marine Drive at Nariman Point, the computation of the

Market Value for the purpose of fixation of royalty amount whether should be in respect of an area which are classified as Veer Nariman Road or classified as Marine Drive. The building Soona Mahal is situated at the Junction of the Veer Nariman Road which is towards the Nariman Point side. Marine Drive Area is different than the said area. The area of Marine Drive is prior to the junction of the Veer Nariman Road and subsequently the area is known as Nariman Point area. In view thereof the area which the Court Receiver should take into consideration in my opinion is the Veer Nariman Road and not Marine Drive. Apart therefrom, a further question is raised whether the property should be computed on the basis of Market Value of Residential flat or commercial/office user of the flat. According to the learned counsel for the respondent in Chamber Summons No.1336 of 2003, the area ought to be computed on the basis of Market Value of residential flat because according to him the actual user of said property is an irrelevant factor. I do not agree with the contention advanced by the learned counsel for the defendant no.1. In my opinion for the purpose of

fixation of royalty, the user is the most important criteria which should be taken into consideration by the Court Receiver. Admittedly, the present premises are used by the firm of R.R. Oomerbhoy for the office/commercial purpose. The documents on record indicates that the said premises is used by R.R.Oomerbhoy for the office/commercial purpose and infact the same is used as godown by the said firm. In view thereof it is clear that premises are not used for residential purpose and accordingly the rate of royalty should be fixed on the basis of market value of the said property on the basis of commercial/office user. The valuer has taken into account the Residential user for the purpose of arriving at the said market value of the property. The Court Receiver has also fixed the market value of the property on the basis of residential user. The residential rate in respect of Veer Nariman Road provides for residential flat rate 151450 per sq.mtr. in respect of industrial/office premises at 160000 per sq.mtr.and in respect of shop/commercial premises at 263000 per sq.mtr. It is the contention on the part of the applicant that the price should be fixed on the

basis of commercial/office user whereas it is the contention of the defendant no.1 that the particulars ought to be on the basis of residential user. In any event even if the user is taken into consideration according to the defendant no.1 the user must be treated as industrial user since the suit premises is not used for office purpose but used as godown. In a register of charge filed by the said firm R.R. Oomerbhoy it has been mentioned that the said premises are used as godown at 5 Soona Mahal, Veer Nariman Road, Mumbai 20. On the basis of the aforesaid entry it has been contended by the learned counsel for the defendant that at the highest the said premises should be considered only for industrial/office user and shop/commercial user.

16. On the other hand, the learned counsel for the plaintiff has relied upon the letterheads of the company known as R.R.Oomerbhoy which interalia indicates the address of the firm on the said letterheads and according to the learned counsel for the plaintiff the same should be counted on the basis of shop/commercial user and not residential

or industrial/office user.

17. After considering the argument on both the parties that the market value of the said property should be fixed on the basis of the area of Veer Nariman Road and not on the basis of Marine Drive area, I am also of the opinion that the market value should be fixed on the basis of industrial / office users of the said premises. It cannot be fixed on the basis of shop/commercial user because it is not a shop. It is actually a flat and situated at 2nd Floor of the said building. Even if it is taken as godown or it is taken as office still both the market value of the premises will have to be fixed on the basis of industrial/office user and not on the basis of shop/commercial user I therefore hold that the area has to be computed on the basis of market value of the said premises of industrial/ office user by the Court Receiver, High Court Mumbai.

18. This leads me to the next contention namely that rate of return of 9% fixed by the Court Receiver is reasonable return or not.I do not find

any error in the fixation of rate of return.In any event neither parties have been able to show to me that why 9% is not a reasonable return as fixed by the Court Receiver and I therefore hold that the said rate of return fixed @ 9% is correct and proper. Accordingly I direct that in so far as Soona Mahal flat is concerned, the Court Receiver should refix the amount of royalty on the basis of market value of the land at Veer Nariman Road and for industrial/ office user and after taking into consideration the market value @ 9% return the court receiver will refix the royalty amount in respect of the said flat.

19. Now turning to the issue of Worli Flat. The issue is very narrow since there is no dispute as to the valuation on the market value of the said property. The only dispute raised is in respect of the area of the said flat. The court Receiver has taken 992 sq.ft as area of the flat. However, the learned counsel for the plaintiff has pointed out to me that agreement of the flat indicates the area as 1750 sq.ft in respect of flat at 2A and in society record the area is shown as 1737 sq.ft

whereas the the Court Receiver shows the area as 992 sq.ft. I find a lot of substance in the contention of the plaintiff. The documents on record indicates the area as 1750 sq.ft. The court receiver is bound to take into consideration the area mentioned as per the agreement and cannot alter the said area unilaterally and without any basis. In view thereof I direct the court receiver to refix the royalty charges of the flat at the market value of the Worli property on the basis of the area of 1750 sq.ft. as mentioned int he agreement of the said flat and re compute the said royalty amount accordingly.

20. The Court Receiver is directed to recompute and refix the royalty amount in accordance with the directions contained in this order within 2 weeks from the date of passing of the order. Both the Chamber Summons disposed of accordingly. However, there shall be no order as to costs.